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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 578

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

The facts sufficiently appear in the opinion of the learned court below (144 F. 2d 62). In its opinion the Circuit Court, mindful of the language of this court in *Helvering* v. *Hallock*,[1] where it was said:

> "The measure of the tax is the value of the transferred property at the time when death brings it into enjoyment,"

held that the value of the transfer at decedent's death consisted of the value of the trust property minus the value of the life expectancies of the two nieces of the decedent whose lives were to measure the life of the trust (R. 42). Since the tax is concerned with a shifting of economic benefits

[1] *Helvering* v. *Hallock*, 309 U. S. 106.

(*Reinecke* v. *Northern Trust Company*[2]) it was properly held that the measure of the benefit alone be subject to tax (*Commissioner* v. *Flanders*,[3] *Bankers Trust* v. *Higgins*[4]). By its decision in the *Hallock* case this court in effect approved the minority opinion in *Helvering* v. *St. Louis Trust Company*[5] wherein Mr. Chief Justice Stone wrote (p. 46):

> "I think that the *value of that interest* was rightly subjected to the tax imposed by Section 302(c)"; (Italics ours.)

and later the learned Chief Justice wrote:

> "The section, in its scope and purpose, is thus similar to Section 302(d) which includes in the decedent's taxable estate *the value of his interest* held as joint tenant or tenant by the entirety although created by deed inter vivos. Tyler v. U. S., 281 U. S. 497; Philips v. Dime Trust & S. D. Co., 284 U. S. 160." (Italics ours.)

In *Commissioner* v. *Flanders, supra*, the learned court said (p. 121):

> "In view of the decision of the Supreme Court in Helvering v. Hallock, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. — , 125 A. L. R. 1368, handed down January 29, 1940, we hold the settlor's possibility of reverter a taxable interest under Section 302(c)."

In *Bankers Trust Company* v. *Higgins, supra*, the learned Circuit Court wrote (p. 478):

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[2]*Reinecke* v. *Northern Trust Company*, 287 U. S. 339, 346.
[3]*Commissioner* v. *Flanders*, CCA 2, 111 F. 2d 117.
[4]*Bankers Trust Company* v. *Higgins*, CCA 2, 136 F. 2d 477.
[5]*Helvering* v. *St. Louis Trust Company*, 296 U. S. 39.

> "The remainders were therefore relieved of a burden by his death; that relief was an 'interest' which 'took effect' at that moment by increasing the remainders *pro tanto*, and it was proper to include it in the estate under the doctrine of Helvering v. Hallock, supra, 309 U. S. 106, 60 S. Ct., 444, 84 L. Ed. 604, 125 A. L. R. 1368."

The decision of the learned court below was therefore clearly right.

The cases of *Fidelity-Phila. Trust Co.* v. *Rothensies*[6] and *Schultz* v. *U. S.*[7] are clearly distinguishable on their facts from the situation here presented.

Fidelity-Phila. Trust Co. v. Rothensies

It is quite true that in the above-mentioned case the Court held that the reservation of a reversionary interest rendered the corpus of the trust taxable to the extent of its full value.

The reasoning of the opinion there, however, excludes and exempts the similar taxation of the corpus of the trust in the instant case. In the *Fidelity-Phila. Trust Co.* case, the Court reached the conclusion that it had to deal with a transfer effective at or after death. This conclusion was arrived at in view of the peculiar and special provisions of that trust which resulted in the decision that the grantor "selected to hold in suspense the ultimate disposition * * * (the) property until the moment of * * * death."

In the *Fidelity-Phila. Trust Co.* case the decedent had created a trust reserving the income to herself for life and upon her death in equal shares to her two daughters during their respective lives with remainder to the descend-

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[6] *Fidelity-Phila. Trust Co.* v. *Rothensies*, CCA 3, 142 F. 2d 838.

[7] *Schultz* v. *U. S.*, CCA 8, 140 F. 2d 945.

ants of the daughters and (importantly) in the event of the death of the daughters without issue to such persons as the Trustor should appoint by Will. In that case the daughters were without issue at the time of the making of the trust (just as was the decedent in the instant case) but in that case such issue survived the Trustor. The decision was made expressly upon the ground as stated by the Court (p. 841):

> "Since the disposition of the estate was held in suspense until her death, that event compels the imposition of the tax. The rights of the beneficiaries other than those of the grantor's daughters could not become absolute until the death of the grantor and had to remain contingent or conditional at least until the happening of that event."

The Court in the *Fidelity-Phila. Trust Co.* case in reaching the conclusion that it did recognize the necessity of distinguishing the *Kellogg* case, 119 F. 2d 54, and by this very necessity recognized the controlling effect of the *Kellogg* decision when applied to appropriate facts. In the *Fidelity-Phila. Trust Co.* case the Court said (p. 840):

> "The case at bar is distinguishable from the Kellogg case on which the appellant strongly relies for in that case, as we have stated, 119 F. (2d) at p. 57, '* * * the fact of importance * * * is that the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could.' Kellogg retained nothing. He had merely a possibility of reverter."

In the case at bar even in the absence of issue of the decedent or upon the failure of such issue to survive, the corpus of the trust is completely disposed of to the brother and sister of the decedent. In the case at bar such brother

and sister at all times possessed a vested remainder subject to be divested only by the birth of issue of the decedent which in fact never occurred. In the case at bar it could not be said that the disposition of the estate was held in suspense until the donor's death, but rather more nearly as was said in the decision in the *Kellogg* case (*supra*, p. 57), the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could. Similarly as was said in Kellogg's decision (p. 56):

> "possible transmission to the next of kin was dependent not upon the grantor's death, but upon the death of various intermediary persons who were all living at the date of the grantor's death."

and as was affirmed in the opinion of the *Kellogg* case (p. 56):

> "The decedent's death had no effect on any specified interest of his children or on any potential interest of his next of kin in the property sought to be taxed as a part of his estate."

In the *Fidelity-Phila. Trust Co.* case it was necessarily the death of the donor which established finally and definitively the disposition of the corpus of the trust, whereas in the instant case the death of the donor was not a necessary factor. In actuality it had no effect upon the final disposition of the corpus other than to dispose of the mere possibility of reverter which theretofore had been vested in the decedent.

Schultz v. *U. S.*

In this case the proceeds of certain life insurance policies which were retained by the insurance company and upon

which interest was paid to the insured for life with remainder over on his death, were held to be included in insured's gross estate in computing estate tax under the Revenue Act of 1926, Section 302 (c) as amended. As its controlling reason the court held and declared (p. 948):

> "Here, as in the Hallock and Klein cases, the interests granted decedent's wife and daughter by the settlement provision incorporated in the policies were contingent upon their survival of decedent. Only decedent's death gave those interests 'definitive measure.' The death of the decedent was the 'indispensable and intended event' which brought the interest of the wife and daughter into being and 'effected its transmission from the dead to the living'. Klein v. United States, supra, 283 U. S. at page 234, 51 S. Ct. at page 399, 75 L. Ed. 996."

At page 949 the court said that it would "regard the proceeds of the policies involved in the case at bar as coming to the beneficiary *through the death of the insured*". (Italics ours.)

In its discussion of the facts in the *Schultz* case, the court declared at page 947:

> "If the policies matured as endowments, the amounts payable under them were to be retained by the company and interest thereon at the rate of $2.47 per thousand dollars was to be paid to Herman E. Schultz, Jr., for life, as beneficiary, and then to his wife *as contingent beneficiary for her life if she survived the insured*." (Italics ours.)

These facts and the enunciated reasons for the conclusion of the court based upon the facts in the *Schultz* case, differentiate it diametrically from the case here. In the case

at bar it was not, to paraphrase the decision in the *Schultz* case (p. 948), only decedent's death that "gave those interests definitive measure", and to continue the paraphrase, the death of the decedent was not "the indispensable and intended event" which brought the interest of the remaindermen into being. On the contrary in the case at bar, as declared in the *Reinecke* case, *supra*, at page 346, "the shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made", and as said in *Commissioner of Internal Revenue* v. *Kellogg*, *supra*, at page 56:

> "Hence, the decedent's death had no effect on any specified interest of his children or on any beneficial interest of his next of kin in the property sought to be taxed as a part of his estate";

and later, at page 57,

> "We think that the fact of importance in the case is that the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could.

In fact, the case at bar would seem to come expressly within the theory declared by the court in the *Schultz* case (p. 948) in its discussion of *Helvering* v. *Hallock*, *supra*:

> "The court held the transfers complete as of the execution of the trusts on the ground that there was no shifting of economic interests in the trust property taking effect at or after the death of the settlor. The interests of the beneficiaries were complete upon the execution of the trusts. The settlor's death determined only the time of enjoyment of those in-

terests by the beneficiaries. It could not diminish nor increase the interest transferred."

Under the trust instrument in question (R. 6-17) the death of the decedent donor was not and could not be the generating cause of the transfer. Only the death of the two measuring lives could have been the generating cause of any such transfer.

Although *Fidelity-Phila. Trust Co.* v. *Rothensies, supra,* and *Schultz* v. *U. S., supra,* cited by petitioner are readily distinguishable on their facts as stated from the situation here presented, we feel that in the light of the court's language in *Helvering* v. *Hallock, supra,* and the dissenting opinion in *Helvering* v. *St. Louis Trust Company, supra,* we must perforce register our accord with the view of the Solicitor General that conflict exists between the *Fidelity* and *Schultz* cases and the decision in this case. The *Fidelity* and *Schultz* cases appear also to conflict with *Commissioner* v. *Flanders, supra, Bankers Trust Company* v. *Higgins, supra, Commissioner* v. *Kellogg,*[8] *Lloyds Estate* v. *Commissioner*[9] and *Central National Bank of Cleveland* v. *U. S.*[10]

It may be that the court will, therefore, grant the Commissioner's petition for certiorari. If the court be so minded, it is prayed that the cause be set down for argument immediately after *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* No. 263 October 1944 Term, in which certiorari was granted.

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[8]*Commissioner* v. *Kellogg,* CCA 3, 119 F. 2d 54.

[9]*Lloyds Estate* v. *Commissioner,* CCA 3, 141 F. 2d 758.

[10]*Central National Bank of Cleveland* v. *U. S.,* Ct. Cls. 41 F. Supp. 239.

We are permitted to say that the Solicitor General has indicated that he has no objection to the foregoing procedure.

Respectfully submitted,

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